Supreme Court, U.S.
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No. 00-0356

In The

Supreme Court of the United States

ANTHONY RUTLEDGE, an individual on his own behalf and beneficiaries of the Hotel Union and Hotel Industry of Hawaii Pension Trust; AFL HOTEL & RESTAURANT WORKERS' HEALTH AND WELFARE FUND,
Petitioners,

v.

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, a California law partnership; MITCHELL WHITEHEAD,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the circuits' unanimous view that a collateral award of attorneys' fees and costs upon remand may be reversed where the underlying remand order was based on legal error?

2. Whether this Court should accept Petitioner's invitation to revisit last term's decision in *Harris Trust v. Saloman Smith Barney* in order to review for error its holding that ERISA provides a cause of action against nonfiduciary service providers for their participation in violations of the prohibited transaction rules?

PARTIES TO PROCEEDINGS

Petitioner

Petitioner is Mr. Anthony Rutledge, a former Trustee of, and participant in the Hotel Union and Hotel Industry of Hawaii Pension Trust and AFL Hotel & Restaurant Workers Health & Welfare Trust Fund, on his own behalf and purportedly on behalf of an uncertified class consisting of participants in said plans. Petitioner was Plaintiff before the Northern District of California and Respondent before the United States Court of Appeals for the Ninth Circuit.

Respondents

Respondents are the law partnership of Seyfarth Shaw (sued under its former name, Seyfarth, Shaw, Fairweather & Geraldson) and Mr. Mitchel Whitehead, a partner in Seyfarth Shaw. Respondents were Defendants before the Northern District of California and Appellants before the United States Court of Appeals for the Ninth Circuit.

None of these parties is a corporation, and no publicly-held corporation owns any portion of these parties.

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OPINIONS BELOW

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

This Petition raises questions under 28 U.S.C. § 1447, 29 U.S.C. § 1106 and 29 U.S.C. § 1108, attached to the Petition as, respectively, Appendices E, F and G.

STATEMENT OF THE CASE

Respondents adopt the statement of facts contained in the opinion below. (App. A, pp. 2a-5a.) In addition, pursuant to Rule 15.1, Respondents point out that the Petition incorrectly represents that the Court of Appeals "was issuing a de facto 'reversal' of the remand order" and that it sought "to *reverse* a non-appealable remand order." (Petition, p. 3 [emphasis in original].) The Court of Appeals did not reverse the District Court's remand order. It simply determined that because the original removal was proper, a collateral award of costs and fees under 28 U.S.C. § 1447(c) was necessarily an abuse of discretion. The remainder of Petitioner's

Statement of the Case (Petition, pp. 3-5) contains erroneous legal argument that is addressed below.

REASONS FOR DENYING THE WRIT

I. THE CIRCUITS AGREE THAT THEY NEED NOT AFFIRM AN AWARD OF ATTORNEYS' FEES UNDER 28 U.S.C. § 1447(c) WHEN THE UNDERLYING REMAND WAS LEGAL ERROR.

Six of the Circuits agree, and none disagree,[1] that they may reverse a collateral award of fees and costs awarded under Section 1447(c) if the underlying remand was erroneous. The rationale for reversal is simple and unassailable: an exercise of discretion resting on a foundation of legal error is inherently an abuse of discretion.[2] This Court

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[1] A Seventh Circuit decision contains one ambiguous footnote that might erroneously be construed as a rejection of the power to reach the an underlying remand when reviewing an award of costs and fees. *Tenner v. Zurek*, 168 F.3d 328, 329 n.1 (7th Cir. 1999). The footnote actually rejects an argument that the fee award was improper because the underlying remand was a refusal to exercise federal jurisdiction rather than a finding that federal jurisdiction was lacking. (The court cited a Fourth Circuit decision rejecting precisely this latter argument.) In a different footnote the court quotes decisions of other circuits holding that review of the underlying remand is proper when reviewing an award of costs and fees, without noting any disagreement. *Id.* at 330 n.2.

[2] *See Agostini v. Felton*, 521 U.S. 203, 238, 117 S.Ct. 1997, 2018 (1997) ("[An] exercise of discretion cannot be permitted to stand if . . . based upon a legal principle that can no

should decline to review Petitioner's assignment of error to this rule, which is not the subject of any inter-circuit conflict.

Petitioner attempts to create the appearance of an inter-circuit conflict by citing to *dicta* in a 1989 Sixth Circuit ruling arising under a previous version of Section 1447.[3] However, he fails to inform this Court that the Third,[4] Fourth,[5] Fifth,[6]

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longer be sustained."); *Koon v. United States*, 518 U.S. 81, 116 S.Ct. 2035, 2047 (1996) ("[A] district court by definition abuses its discretion when it makes an error of law . . . .")

[3] Section 1447(c) was amended on November 19, 1988 by the Judicial Improvements and Access to Justice Act, Pub. L. 100-702, 102 Stat. 4642, 4670.

[4] *Mints v. Educational Testing Service*, 99 F.3d 1253, 1260-61 (3d Cir. 1996) ("[W]e agree that section 1447(d), in precluding an appeal from an order of remand for a reason provided for remand in section 1447(c), does not preclude all evaluation of a remand order. . . We also point out that a court of appeals might be reluctant to uphold an award of fees under section 1447(c) if it concluded that the district court erred in remanding the case for a reason enumerated in section 1447(c) even though it could not reverse the order of remand.")

[5] *Sanford v. Moving Picture Machine Operators' Protective Union*, 14 F.3d 596, 1993 WL 542168 (4th Cir. 1993) ("the propriety of the defendant's removal continues to be central in determining whether to impose fees.") (quoting *Miranti v. Lee*, 3 F.3d 925, 928 [5th Cir. 1993]).

[6] *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993) ("[W]e hold that the propriety of the defendant's removal continues to be central in determining whether to impose fees."). *Accord*, *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 292 (5th Cir. 2000); *Avitts v. Amoco Production Co.*, 111 F.3d 30, 32 (5th Cir. 1997).

and Tenth[7] Circuits all agree with the Ninth on this point, and that the Ninth's position is based on longstanding precedent, not simply a whim of the reviewing panel.[8]

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[7] *Daleske v. Fairfield Communities, Inc.*, 17 F.3d 321, 324 (10th Cir), *cert. denied*, 511 U.S. 1082 (1994) ("'the propriety of the defendant's removal continues to be central in determining whether to impose fees'") (quoting *Miranti*, 3 F.3d at 928). *Accord, Suder v. Blue Circle, Inc.*, 116 F.3d 1351, 1352 (10th Cir. 1997); *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 322 (10th Cir. 1997).

[8] *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 490 (9th Cir. 1995) ("Although awards of attorney's fees are generally reviewed only for abuse of discretion, this court reviews de novo the legal question of whether section 1447(c) authorizes the fee."); *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992) ("Given the wise discretion provided the district court by section 1447(c), we will review an award of attorney's fees under this statute for an abuse of discretion. Although this standard will require some consideration of the underlying remand order, [citation omitted] such consideration does not amount to impermissible review of the remand order. After all, on review of the fee award, we are not empowered to reverse the remand order, whether or not it is erroneous."); *Schmitt v. Insurance Co. of North America*, 845 F.2d 1546, 1551-52 (9th Cir. 1988) ("The fact that section 1447(d) bars review of the district court's order of remand does not effect our jurisdiction to review that portion of the district court's order awarding attorney's fees to the plaintiffs. . . . The district court's award of attorney fees in the present case completely and finally disposed of all claims before the court. We conclude, therefore, that we have jurisdiction to review that portion of the district court's order awarding attorney's fees to the plaintiffs.")

Petitioner also fails to inform this Court that the Sixth Circuit decision upon which he relies has no continuing vitality. First, the Fifth Circuit has expressly declined to adopt the Sixth Circuit's reasoning[9] (the others do so by necessary implication), and none has adopted it. Second, while the Sixth Circuit "seemingly eschewed consideration of the merits of the defendant's argument for removal, it nevertheless considered the 'weakness' of 'the removal question' in evaluating the district court's exercise of discretion."[10] Third, and most important, **the Sixth Circuit has repudiated its earlier position**. In *Stallworth v. Greater Cleveland Regional Transit Authority*,[11] it discussed earlier Ninth and Fifth Circuit decisions approving review of the propriety of the underlying remand upon review of a fees order and held that "[o]n the authority of these cases" it would do likewise.[12] The Sixth Circuit concluded that "a circuit court might hold: 'The district court obviously erred in remanding the case. We can do nothing about that; but we hold that an award of attorney fees flowing from such error is an abuse of discretion.'"[13] If there ever was an inter-circuit conflict concerning the propriety of reviewing the legal merits of the underlying remand for the purpose of reviewing an award of costs and fees under Section 1447(c), there is none now.

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[9] *See Miranti*, 3 F.3d at 928.

[10] *Id.* at 928 (*quoting Bucary*, 883 F.2d at 449).

[11] 105 F.3d 252 (6th Cir. 1997).

[12] *Id.* at 255.

[13] *Id.* at 255 n.3 (rhetorical quotation marks in original).

The approach of the Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits accords with *Cooter & Gell v. Hartman Corp.*,[14] in which this Court noted that:

> "**motions for costs or attorney's fees are 'independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree.'** . . . Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather it requires the determination of a collateral issue . . . ."[15]

This approach does not frustrate Congress' purposes in preventing direct review of remand orders, as the Third Circuit has pointed out:

> "Section 1447(d) is intended to avoid the delays attendant upon appeal from an order of remand. [*Citations omitted.*] An evaluation of an order of remand in the context of the review of an award of fees under section 1447(c) does not raise the concerns regarding delay that section 1447(d) seeks to avoid, as that evaluation will not interfere with the proceedings in the state court."[16]

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[14] 496 U.S. 384, 110 S.Ct. 2447 (1990).

[15] *Id.* at 395-96 (emphasis added).

[16] *Mints*, 99 F.3d at 1260-61. *Accord Stallworth*, 105 F.3d at 255.

Petitioner's suggestion that this approach creates "a judicial morass" and an "impossible conflict" (Petition, p. 7) when state courts are required to determine whether it is the district court's remand order, or the Court of Appeals' reversal of the collateral fee award, that is entitled to preclusive effect under the Full Faith and Credit Act,[17] is simply unfounded. It is the second federal determination (necessarily the decision of the Court of Appeals) that is entitled to preclusive effect in subsequent state proceedings.[18] This is how it should be. No public policy or equitable consideration requires that collateral estoppel effect be given to a ruling that has later been found by a reviewing court to be legal error.

Petitioner simply presents no good reason for this Court to review for error a procedural rule that enjoys the express assent of half the circuits, suffers the dissent of none, and accords with this Court's own pronouncements. This is particularly so when law, equity and common sense coincide in their recommendation of a rule that enjoys such widespread recognition. This Court should decline review.

II THIS COURT NEED NOT REVISIT LAST TERM'S DECISION IN *HARRIS TRUST* FOR THE PURPOSE OF DETERMINING WHETHER THE UNANIMOUS CIRCUITS ARE IN ERROR.

Petitioner next argues that the opinion below conflicts with prior decision of this Court and various courts of appeal.

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[17] 28 U.S.C. § 2283.

[18] *E.g., Robi v. Five Platters, Inc.*, 838 F.2d 318, 322-23 (9th Cir. 1988). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 15 (1982).

The fulcrum upon which this argument turns is his claim that "there is no ERISA provision regulating a party-in-interest's *self initiated* violations (such as fraud, breach of contract, breach of fiduciary duty). Since there is no regulation of the party-in-interest's self-initiated wrongs, there is no 'ERISA governed relationship.'" (Petition, p. 9 [emphasis in original].) He conveniently ignores the fact that this Court held last term in *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*[19] that a nonfiduciary party-in-interest's participation in a prohibited transaction does implicate an "ERISA governed relationship"– ERISA provides a specific equitable remedy to redress such a violation.

Petitioner presumably relies upon the italicized phrase "self initiated" to justify omitting all mention of *Harris Trust*. What "self initiated" means is unclear: It apparently refers to his argument that this Court in *Lockheed Corp. v. Spink*[20] held that a nonfiduciary party-in-interest can be sued under ERISA only if a fiduciary "caused" the prohibited transaction. Petitioner seems to imply that this requires the joinder of a cause of action against a fiduciary to any claim against a party-in-interest. (Petition, pp. 8-9.) Since he conveniently omits such a cause of action from his own complaint, Petitioner concludes that court below erred in concluding that his complaint alleged a prohibited transaction violation against the Respondent.

In trying to navigate his argument between Scylla and Charybdis, Petitioner manages to founder on both.

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[19] – U.S. –, 120 S. Ct. 2180 (2000).

[20] 517 U.S. 882, 889 & n.3, 116 S.Ct. 1783, 1789 & n.3 (1996).

First, this Court announced no such joinder rule in *Lockheed*. All it did was announce the truisms that (1) a nonfiduciary party-in-interest cannot be subject to equitable relief for engaging in a prohibited transaction if the prohibited transaction rules were, in fact, not violated, and (2) the prohibited transaction rules are not violated if plan fiduciaries honor the proscriptions of ERISA § 406. ERISA imposes no joinder requirements. That the Federal Rules of Civil Procedure might require such joinder does not compel the conclusion that ERISA does not completely preempt Petitioner's complaint. Instead, it leads to the conclusion that the complaint is vulnerable to attack, whether under Rule 12, or by way of demurrer under state law.

Second, Petitioner's complaint does allege that a "fiduciary caused the plan to engage in an unlawful transaction." (Petition, p. 9.) Paragraph 16 of the Complaint alleges that "[t]he Trusts on behalf of plaintiffs, paid defendants' bills without plaintiffs knowing that they were being charged more than $155 per hour." (App. G, p. 73a.) The "Trusts" are the ERISA plans in question. (App. G, p. 70a, ¶ 1.) "[P]laintiffs" are Petitioner (in his capacity as a plan participant) and a putative class containing all of the other participants. (*Id.*) The "Trusts," being noncorporeal entities, cannot have "paid defendants' bills" except by acting through their fiduciaries (or agents of the fiduciaries). While a lack of knowledge is alleged on behalf of the "plaintiffs" (that is, the participants), no similar lack of knowledge concerning Respondents' billing practices is ascribed to the plan fiduciaries who "paid defendants' bills."

Petitioner's artful pleading is simply not artful enough to hide the fact that he is suing to disgorge allegedly-excessive fees paid to a service provider by a plan. If the fees are excessive (a fact denied by Respondent, but of no moment at

this juncture of the proceedings), then under *Harris Trust* ERISA provides a specific and exclusive remedy.

As a hedge against the possibility that his omission of all mention of *Harris Trust* might be noticed, Petitioner cites decisions from various circuits holding that "ERISA does not generally preempt state law contract, negligence and malpractice actions brought by plans against nonfiduciary service providers." (Petition, p. 11.) In doing so, Petitioner ignores the important difference between causes of action based on duties of performance owed by nonfiduciary service providers to plans, and those based on financial irregularities in the relationship between a service provider and the plan it serves. Duties of performance arise out of the contractual arrangements between plans and their service providers, and state law doctrines defining standards of professional due care owed by service providers to their plans. Although ERISA regulates duties of performance owed by fiduciaries to their plans,[21] it does not prescribe duties of performance owed by nonfiduciary service providers. In contrast, ERISA expressly regulates the financial relationships between nonfiduciary service providers and plans through the prohibited transaction rules set forth in Sections 406(a) and 408(b) (28 U.S.C. §§ 1106[a] and 1008[b]). Even more precisely, ERISA expressly forbids, and provides a remedy to plan participants for, the actions which Petitioner charges

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[21] See ERISA § 404, 29 U.S.C. § 1104(a)(1)(B) (imposing a duty on plan fiduciaries to perform services "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use.").

against Respondents: overcharging a plan for services.[22] The opinion below expressly adopted this distinction. (App. A, p. 23a n.12.)

Each of the decisions cited by Petitioner come out of suits brought by fiduciaries in the name of their plan to redress the failure of service providers to satisfy state law duties of performance. That each of these decisions found no ERISA preemption demonstrates that the opinion below was consistent with them, not that it created an inter-circuit conflict. In *Airparts Co. v. Custom Benefit Services,*[23] an actuarial firm failed to provide timely advice concerning statutory changes, miscalculated benefits, and prepared a useless plan amendment. In *Pappas v. Buck Consultants, Inc.,*[24] plan actuaries were sued for mishandling distributions so as to leave the plan underfunded. In *Custer v. Sweeny,*[25] a plan attorney was sued for his failure to provide competent representation to the plan in connection with abusive

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[22] Section 406(a)(1)(C), 29 U.S.C. § 1106(a)(1)(C), prohibits the payment of plan assets to "parties in interest." Any person or entity that provides service to an ERISA plan, even if not a fiduciary, is a "party in interest." 29 U.S.C. § 1002(14)(B). Section 408(b)(2), 29 U.S.C. § 1108(b)(2), permits the payment of reasonable compensation to providers of necessary services to the plan, including legal services, notwithstanding the prohibition set forth in Section 406(a)(1)(C). Payments exceeding agreed-upon rates–the basis of Petitioner's complaint–fall outside the exemption provided in § 408(b)(2), and thus necessarily violate § 406(a)(1)(C).

[23] 28 F.3d 1062 (10th Cir. 1994).

[24] 923 F.2d 531 (7th Cir. 1991).

[25] 89 F.3d 1156 (4th Cir. 1996).

transactions initiated by a plan trustee. In *Painters District Council No. 21 v. Price Waterhouse,*[26] plan auditors were sued for their failure to properly identify a plan administrator's mishandling of assets. In *Arizona State Carpenters Pension Trust v. Citibank,*[27] a bank was sued because it failed to meet its obligation to notify plan trustees about defaults on interest and principal payments on investments instruments, causing the plan additional losses.

This distinction serves the important function of supporting the bright line between participant enforcement of ERISA's standards governing fiduciary conduct and prohibited transactions, on the one hand, and costly (and unwarranted) interference with the day-to-day operation of plans on the other. ERISA's civil enforcement provision, § 502 (29 U.S.C. § 1132), empowers participants to police fiduciary misconduct (including, per *Harris Trust*, to seek disgorgement of ill-gotten gains from nonfiduciary service providers), but does not permit participants to question the business judgment of fiduciaries by suing for ordinary breaches of contract by plan service providers. Petitioner brings this lawsuit not in his capacity as a plan trustee, but purely as a participant seeking to represent a class of participants. It is the structural analog to a shareholder's derivative action. The distinction between duties of performance and ERISA-imposed financial duties is the analog of the Business Judgment Rule when derivative litigation concepts are applied in the ERISA context. Just as any plaintiff in a shareholder's derivative suit would be pleased to do away with the impediments of the Business

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[26] 879 F.2d 1146 (3d Cir. 1989).

[27] 125 F.3d 715 (9th Cir. 1997).

Judgment Rule, Petitioner would like to avoid the implications of this distinction, so that he may ignore the limitations of ERISA's civil enforcement provisions and fashion a state law basis to challenge the business judgment of plan trustees. However, he presents no sound public policy to justify his ambitions.

Petitioner's attempt to create the appearance of a conflict between the opinion below and decisions of this Court, the other circuits, and earlier decisions of the Ninth Circuit is a failure. The opinion below accords with this Court's decision in *Harris Trust*, and strikes the proper balance between traditional state law regulation of the duties of performance owed by professional service providers such as attorneys, accountants, actuaries and consultants, and ERISA's regulation of the financial relationships between service providers and plans.

CONCLUSION

For the reasons set forth above, Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

/s/_____

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